HONGKONG & SHANGHAI BANKING CORP. LTD.

v.

KALINE HOLDINGS SDN. BHD. & ORS.

HIGH COURT BORNEO
IAN HC CHIN JC
[SUIT NO. 49 OF 1991]
8 APRIL 1992

CIVIL PROCEDURE: *Application for summary judgment - Whether notice of demand a pre-condition - Whether properly posted to the defendants guarantors - Whether bare denial of indebtedness couched in terms of asking the plaintiffs to prove debt - A good defence in law - Guarantee - Whether continuing guarantee given by the defendants O. 14 r. 2 RHC 1980.*

CIVIL PROCEDURE: *The type of remedy the plaintiffs can seek under the foreclosure action - Whether plaintiffs can ask the Assistant Collector of Land Revenue, and whether the power - To order the 1st defendants to pay the plaintiffs the amount owing - Land Ordinance of Sabah.*

The plaintiffs by a summons in chambers dated 11 January 1992 applied for summary judgment against the 1st, 2nd and 4th defendants for the amount claimed with interest and costs. The plaintiffs through its assistant manager Chong Hyen Song affirmed on 9 January 1992 and on 26 March 1992 two affidavits in support of its application for summary judgment.

The 1st defendants, 2nd defendants and 4th defendants (the defendants) relied on the affidavit of the 2nd defendants affirmed on 28 February 1992 in opposition to the application for summary judgment.

Held:

[1] In any event, assuming that a notice of demand and the dispatch of such notice to the registered address of the 1st defendants, is a pre-condition for the plaintiff's action, the plaintiffs have produced an unrefuted and undisputed evidence which is a copy of the Form 44 certified by Assistant Registrar of Companies on 24 March 1992, showing the registered address of the 1st defendants to be one to which the plaintiffs had dispatched its notice of demand. It ought to be pointed out also that the notices of demand issued to the 2nd and 4th defendants were posted to the address provided for in the said guarantee. There is therefore no triable issue here.

[2] Once compliance is made by the plaintiffs with O. 14 r. 2 of the RHC 1980 which compliance the Counsel for the defendants admitted and stated that he has no preliminary objection to the plaintiffs' application for summary judgment - the burden falls upon the defendants to satisfy the Court with regard to the claim of the plaintiffs that there is an issue or question in dispute which ought to be tried or there ought for some other reason to be a trial of the claim; otherwise the Court may give judgment for the plaintiffs. This burden, the defendants cannot satisfy by making a bare denial of indebtedness which the defendants are in effect doing when the defendants maintain that the plaintiffs must prove the debt. There is also no triable issue.

[3] The learned Judge opined that notwithstanding the foreclosure action taken by the plaintiffs under the Land Ordinance, they are, upon the true construction of the annexure to the charge entitled to take out the present action.

[4] In so far as the 2nd and 4th defendants's, who are the guarantors are concerned, the plaintiffs can commence legal action against them under the guarantee at the same time or before or after the plaintiffs are taking or have taken proceeding against the 1st defendants under the charge. The law on this point is too well established to admit of argument to the contrary.

[Order in terms of summons in chambers.]

Cases referred to:
Ex parte Yong, In re Kitchen [1881] AC 668 ***(dist)***
Gissco Sdn. Bhd. v. Blackgold (M) Sdn. Bhd. [1988] 2 MLJ 139 ***(cons)***
Huo Heng Oil Co. (E.M.) Sdn. Bhd. v. Tang Tiew Yong [1987] 1 MLJ 139 ***(cons)***
Hongkong & Shanghai Banking Corp. Ltd. v. Wan Mohd. bin Wan Ngah [1991] 3 MLJ 119 ***(dist)***
Williams v. Hunt [1905] 1 KB 512 ***(dist)***
In PL Schuler A. G. v. Wickman Machine Tools Sales Ltd. [1974] AC 235 ***(foll)***
Co-operative Central Bank Bhd. v. Belaka Suria Sdn. Bhd. [1991] 3 MLJ 43 ***(cit)***
Malaysian International Merchant Bankers Bhd. v. G & C Securities Sdn. Bhd. & Anor. [1988] 2 MLJ 471 ***(cons)***
Malaysia Building Society Bhd. v. Li Kheng Kim & Ors. [1988] 3 MLJ 175 ***(cons)***
Bank Bumiputra Malaysia Bhd. v. Doric Dvpt Sdn. Bhd. & Ors. [1988] 1 MLJ 462 ***(cons)***
Bank Bumiputra Malaysia Bhd. v. Esah bte. Abdul Ghani [1986] 1 MLJ 16 ***(cons)***
United Malayan Banking Corp. Bhd. v. Tan Lian Keng & Ors. [1990] 1 MLJ 280 ***(cons)***

Legislation referred to:
Contracts Act 1950, ss. 81, 82
Land Rules 1930 (Sabah), r. 14(20)
Rules of the High Court 1980, O. 14 r. 2

Other source referred to:
Modern Law of Guarantee, O' Donovan Philips
Fisher & Lightwood's Law of Mortgage, 9th Edn., 1977, pp. 270-271

For the plaintiffs - Frederick Lo, Esq.; M/s Chong & Pang
For the 1st, 2nd and 4th defendants - Lawrence Chong, Esq.; M/s Yong & Chia

JUDGMENT

Ian HC Chin JC:

History of case

The plaintiffs by a specially indorsed writ issued 10 July 1991 claim against Kaline Holdings Sdn. Bhd. (lst defendants) the sum of RM4,828,023.63 (together with agreed interest at the rate of 9.5% per annum on the sum of RMl,479,159.20 and agreed interest at the rate of 10.5% per annum on the sum of RM478,397.57 from 25 May 1991 to the date of full payment) being money lent by the plaintiffs to the 1st defendants. The plaintiffs also claim against Kua Nam Kiang (2nd defendants), Chua Chun Eng (3rd defendants), Siau Fung Oi (4th defendants) and Lee Li Fong (5th defendants) the said sum under a guarantee (said guarantee) dated 10 October 1987.

The plaintiffs by a summons-in-chambers dated 11 January 1992 applied for summary judgment against the 1st, 2nd and 4th defendants for the amount claimed with interest and costs. The plaintiffs through its assistant manager Chong Hyen Siong affirmed, on 9 January 1992 and on 26 March 1992, two affidavits, in support of its application for summary judgment.

The 1st defendants, 2nd defendants and 4th defendants (hereinafter collectively referred to as the defendants) relied on the affidavit of the 2nd defendants affirmed on 28 February 1992 in opposition to the application for summary judgment. I heard arguments from Counsel for the parties on 31 March 1992 and reserved judgment which I indicated to Counsel will be delivered in writing on 8 April 1992.

Contentions of the Defendants and Conclusions

It was first contended by Counsel on behalf of the defendants that a pre-condition for the plaintiffs' claim had not been satisfied which is that no notice of demand had being given to the defendants because the plaintiffs had sent the notice of demand to the 1st defendants to an address which was no longer the registered address of the 1st defendants. In support of this contention, the defendants produced a Form 44 of the Companies Act, exhibit "KNK-l", dated 2 May 1991, which states that as from 2 May 1991 the registered office of the 1st defendants has been changed from "Wisma Fuji, 2 1/4 mile, Jalan Sin Onn, 91000 Tawau, Sabah", to which address the plaintiffs had sent its notice of demand (exhibit CHS-2) to the 1st defendants on 23 May 1991, to "TB529-530 Town Extension 2, Jalan Haji Karim, 91000 Tawau, Sabah". There is no evidence of the said Form 44 having been filed with the Registry of Companies let alone the date of filing. In any event, assuming that a notice of demand and the dispatch of such notice to the registered address of the 1st defendants, is a pre-condition for the plaintiffs' action, the plaintiffs have produced an unrefuted and undisputed evidence (exhibit CHS-3), which is a copy of the Form 44 certified by the Assistant Registrar of Companies on 24 March 1992, showing the registered address of the 1st defendants to be the one to which the plaintiffs had dispatched its notice of demand. Another answer, which Counsel for the plaintiffs did not advance, to the defendants' contention can be found in Clause 3 of the Annexure to the Memorandum of Charge (exhibit KNK-2b) which stipulated the very address to which the plaintiffs had sent the notice of demand. It ought to be pointed out also that the notices of demand issued to the 2nd and 4th defendants were posted to the address provided for in the said guarantee. There is therefore no triable issue here.

It was next contended by the said defendants that the plaintiffs have to prove the amount claimed by them and this the plaintiffs have not done. The case of *Ex parte Yong, In re Kitchen* [1881] AC 668 was cited as supporting the proposition. The headnote of that case reads:

> In the absence of special agreement a judgment or an award against a principal debtor is not binding on the surety, and is not evidence against him in an action against him by the creditor, but the surety is entitled to have the liability proved as against him in the same way as against the principal debtor.

That case has no relevance to the present matter and neither can the defendants' proposition stand in view of the laws governing application for summary judgment. Once compliance is made by the plaintiffs with O. 14 r. 2 of the Rules of the High Court which compliance the Counsel for the defendants admitted when he stated, in response to a question from me, he has no preliminary objection to the plaintiffs' application for summary judgment - the burden falls upon the defendants to satisfy the Court with regard to the claim of the plaintiffs that there is an issue or question in dispute which ought to be tried or there ought for some other reason to be a trial of the claim; otherwise the Court may give judgment for the plaintiffs. See *Gissco Sdn. Bhd. v. Blackgold (M) Sdn. Bhd.* [1988] 2 MLJ 397, at p. 399. This burden, the defendants cannot satisfy by making a bare denial of indebtedness which the defendants are in effect doing when the defendants maintain that the plaintiffs must prove the debt. See *Huo Heng Oil Co. (E.M.) Sdn. Bhd. v. Tang Tiew Yong* [1987] 1 MLJ 139, at p. 142. There is also no triable issue here.

The third contention of the defendants is that as foreclosure proceedings have been taken by the plaintiffs against the property of the 1st defendants, the plaintiffs cannot commence the present action against the 1st defendants. The Counsel for the defendants cited the following cases as supporting the proposition of law - *Hongkong & Shanghai Banking Corp. Ltd. v. Wan Mohd bin Wan Ngah* [1991] 3 MLJ 119 and *Williams v. Hunt* [1905] 1 KB 512. Counsel for the defendants also submitted that since the liability of the 2nd and 4th defendants, who are the guarantors, are co-extensive with that of the 1st defendants, the principal, and since legal action cannot be commenced against the 1st defendants, legal action cannot also be commenced against the 2nd and 4th defendants. In support thereof s. 81 of the Contracts Act and O'Donovan Philips on *Modern Law of Guarantee* were cited.

As Counsel for the plaintiffs did not dispute the allegation that the foreclosure proceedings were taken before the present legal action was commenced, despite evidence (exhibit KNK-2a of the affidavit of Kua Nam Kiang affirmed on 28 February 1992) showing otherwise, the Court will so assume.

The Hongkong & Shanghai Banking Corp. Ltd. case concerns a housing loan granted to an individual defendants upon the security of the land which was charged to the plaintiff bank under the provisions of the National Land Code. The defendants defaulted and the plaintiff obtained an order from the Kuantan Land Office for the auction sale of the land. The plaintiff also issued a writ against the defendants for the same amount due under the said charge. The Court was asked to determine the question:

> whether the plaintiff being also the chargee of property ... was entitled in law and in equity to proceed by way of a civil suit before first realizing the security under the charge and ... whether the plaintiff was entitled to proceed concurrently on all the remedies.

Lamin J answered the said question in the negative and a stay of the action was ordered. That case without any doubt revolves upon the interpretation of the various clauses of an annexure to the charge and this can be gathered from the following passages in the judgment of Lamin J, at p. 122, where he after reciting various clauses of the annexure to the charge, said:

> It is quite clear that upon reading the annexure as a whole the chargee and the chargor are bound by the terms and conditions of the charge and to realize the amount, the land must be sold in accordance with the provisions of the National Land Code 1965 (NLC). If the amount realized from the sale is not sufficient to cover the amount due then it is implied that a separate action may be taken against the debtor/chargor to recover the balance should he fail to pay the chargee the difference.

and again at p. 123, where he, after reciting various sentences of Clause 6 of the annexure to the charge, said:

> The real intent of this provision appears to be that when the loan becomes payable, of course the plaintiff will immediately become entitled to recover and when he decides to proceed to recovery, he must exercise his rights and powers as provided in the annexure to the charge. I am unable to read into it otherwise and all the more so with the operation of clause 36, 37 and 40. The annexure must be given effect to.

Lamin J in that case is not laying down any general principle of law that a chargee cannot issue a writ or commence legal action in respect of a debt in which land has been charged to secure its payment until the chargee has completed the foreclosure proceedings under the National Land Code which a chargee has already commenced in the land office. His decision relates to the meaning to be given to the various clauses of the annexure to the charge and should therefore be confined to the facts of that case.

In any event that case can be distinguished from the present case. Though Clauses 6, 8, 36 and 37 of that case are almost similar to Clauses 5, 11, 21 and 22, there is a vital distinction between Clause 6 of that case and Clause 5 of the present case. Unfortunately, the said Clause 6 has not been fully reproduced in that case but only the following part has been cited, *viz*:

> and to exercise the rights and powers upon default herein this charge.

Clause 5 of the present case, with the vital distinction underlined and missing in the said Clause 6 of that case, provides that in the event of the default of the chargor (the 1st defendants)

> the balance of the principal sum remaining unpaid and interest thereon and all other moneys due and owing including interest thereon shall become immediately payable by the chargor to the chargee who shall henceforth become entitled to recover the same with interest thereon at the aforesaid rate and to exercise all its rights and powers upon default therein this charge **and by law provided without any previous notice or concurrence on the part of the chargor.**
>
> (Emphasis supplied)

The just cited provision in addition to conferring upon the plaintiffs the right to exercise "its rights and powers ... therein this charge" (which includes, *inter alia*, the power to give the one month statutory notice under the Land Ordinance of Sabah demanding payment before applying for an order of sale as provided under Clause 14 of the annexure) also confers upon the plaintiffs the rights and powers "by law provided" which would include the common law right to issue a writ against the 1st defendants claiming for the amount falling due though this right is qualified by r. 14, subrule (20) of the Land Rules which prohibits the levying of any execution proceedings under the judgment of the Court against the charged property in respect of the same debt.

To construe the annexure of the charge of the present case in the manner done in *Hongkong & Shanghai Banking Corp. Ltd.* case would in certain circumstances have the unreasonable result of relieving the chargor from any liability to pay even though the loan is not fully repaid. This can happen when, instead of an auction pursuant to foreclosure proceedings, the charged property is acquired by the government or is destroyed by fire and the compensation resulting therefrom is not sufficient to cover the loan, resulting in the the pre-condition of "realizing the amount" (to borrow the words used in the *Hongkong & Shanghai Banking Corp. Ltd.* case) under an auction sale first before you can sue in Court impossible of compliance as the property, on account of the acquisition or destruction by fire, could no longer be auctioned. Such an unreasonable result could not have been intended by the parties. See *In P L Schuler A.G. v. Wickman Machine Tool Sales Ltd*. [1974] AC 235, at 251, per Lord Reid.

I am therefore of the opinion that notwithstanding the foreclosure action taken by the plaintiffs under the Land Ordinance of Sabah, the plaintiffs are, upon the true construction of the annexure to the charge, still entitled to take out the present action.

The case of *Williams v. Hunt* was cited by Counsel for the defendants as supporting the proposition that as foreclosure proceedings have been taken by the plaintiffs against the property of the 1st defendants, the plaintiffs cannot commence the present action against the 1st defendants. In order to know what was actually said in the decision of Collins MR in that case, I think it is best to reproduce his judgment in full:

I am of opinion that execution must be stayed. It seems clear to me that this is an attempt to defeat what the Court of Appeal held to be the law in *Poulett v. Hill.* (1)

Where two separate remedies are possible, and a start is made by putting in force one of those remedies by a writ which would entitle the plaintiff to the relief he subsequently desires, he cannot by deliberately leaving that out of his claim reserve his right to ask for it in another proceeding. Where proceedings have been started, it is an abuse of the process of the Court to divide the remedy where there is a complete remedy in the Court in which the suit was first started. *In this case personal payment was not asked for in the writ in the Chancery action, and that appears to have been done because the plaintiff desired to put into operation the remedy under O. XIV and have recourse to two separate proceedings, in the first of which she might have got all the relief to which she is entitled. That she could have done is abundantly clear,* as appears from the judgment of Lindley LJ in *Poulett v. Hill.* (1) He says : Before the Judicature Acts a personal order for payment could only be obtained by bringing a common law action in which interest could only be recovered down to the date of the writ, and a personal order for payment of the subsequent interest could only be obtained by fresh action; but now that a personal order can be obtained for payment of what is found due on taking the account, such second action is unnecessary. In *Farrer v. Lucy, Hartland & Co.* (1) the form of judgment is given which was settled by the Court of Appeal. Whether this particular point was present to the mind of the Court is not quite clear; but a general form was settled giving a personal order for payment of what was found due for principal and interest on taking an account, so that the necessity for a subsequent action for interest is taken away. The plaintiffs then could in the first action have obtained a personal order for payment of all that was due to them for principal and interest, and the present action is unnecessary. If it were to affirm the order under appeal our decision would lead to bringing improper and vexatious actions." In my opinion, therefore, this application must be allowed.

(Emphasis supplied)

The emphasised part of the judgment above quoted speaks of the availability of the order for personal payment in the Chancery action but the plaintiff instead of seeking that order in the Chancery action, commenced an action in the King's Bench Division in order to obtain the said order for personal payment. The action in the King's Bench Division was stayed.

In the present case the remedy which the plaintiffs can seek under the foreclosure action is an order of the Assistant Collector of Land Revenue for the auction sale of the property under the Land Ordinance of Sabah. The plaintiffs cannot ask the Assistant Collector of Land Revenue, and neither has the Assistant Collector of Land Revenue the power, to order the 1st defendants to pay the plaintiffs the amount owing. The two are not the same. Therefore *Williams v. Hunt* case has no application here.

The case of *Co-operative Central Bank Bhd v. Belaka Suria Sdn. Bhd.* [1991] 3 MLJ 43, which was not referred to in *Hongkong & Shanghai Banking Corp. Ltd. case,* is a decision of Lim Beng Choon J where, after citing with approval *Fisher & Lightwood's Law of Mortgage* (9th Edn., 1977) at pp. 270-271 and *Gordon Grant & Co. Ltd v. Fl Boos* at p. 784, he at p. 47 said:

In principle therefore a chargee has a right to institute an action for recovery of the debt and also a right to assert the power of sale on the incumbered property; the two actions are not the same. The reason for allowing the chargee to pursue all remedies available to him is stated in *Gordon Grant & Co's* case in this way at pp. 786-787:

If the property realizes more than what is due to him, the mortgagor gets the balance. If the property realizes less, the mortgagee is *pro tanto* unpaid and should be allowed to sue on the personal covenant.

That statement of the law, I respectfully agree. Therefore, the plaintiffs have the right to proceed under the Land Ordinance of Sabah and at the same time or afterwards take out a writ to sue for the amount due from the 1st defendants.

In so far as the 2nd and 4th defendants, who are the guarantors, are concerned, the plaintiffs can commence legal action against them under the guarantee at the same time or before or after the plaintiffs are taking or have taken proceeding against the 1st defendants under the said charge. The law on this point is too well established to admit of argument to the contrary. See *Malaysian International Merchant Bankers Bhd v. G & C Securities Sdn. Bhd. & Anor.* [1988] 2 MLJ 471; *Malaysia Building Society Bhd v. Li Kheng Kim & Ors.* [1988] 3 MLJ 175; *Bank Bumiputra Malaysia Bhd. v. Doric Dvpt. Sdn. Bhd. & Ors.* [1988] 1 MLJ 462; and *Bank Bumiputra Malaysia Bhd. v. Esah bte Abdul Ghani* [1986] 1 MLJ 16.

Given what I have hitherto said I do not see the relevance of the other authorities, s. 82 Contracts Act and O'Donovan Philips on *Modern Law of Guarantee,* cited by Counsel for the defendants and I, therefore, will not deal with them.

The final contention on behalf of the 2nd and 4th defendants relates to a new loan amounting to RM700,000, forming part of the sum claimed by the plaintiffs, which was given on 5 December 1989 more than two years after they had executed the guarantee on 12 October 1987. The said defendants contend that "it was not envisaged" by them or "it was not made clear" to them that the said loan would be covered by the said guarantee. As pointed out by Counsel for the plaintiffs, the complete answer to that contention can be found in Clauses 1 and 6 of the said guarantee (exhibit CHS-l) which provide that the guarantee is a continuing guarantee to cover future advances with or without the assent or knowledge of the said defendants. The defendants are bound by the terms of the guarantee and therefore what they "envisage" and what was "not made clear" to them - which is actually an attempt involving oral evidence to contradict the terms of the written guarantee - are of no consequence and cannot be issues for trial. See *United Malayan Banking Corp. Bhd. v. Tan Lian Keng & Ors.* [1990] 1 MLJ 280.

I therefore order that final judgment be entered against the 1st defendants, the 2nd defendants and the 4th defendants in terms of the summons-in-chambers dated 11 January 1992 and costs to be taxed and paid by the said defendants.

Also found [1992] 2 CLJ 1286